

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1315

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellant,

- against -

PAUL LABRIOLA and THOMAS
CONTINO,

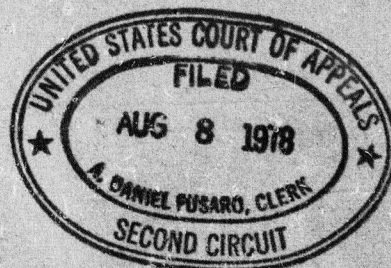
Appellees.
-----X

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEE LABRIOLA'S PETITION FOR
RE-HEARING WITH SUGGESTION FOR
RE-HEARING EN BANC

CAROL MELLOR
Attorney for Paul Labriola

Office & F.O. Address
Two Lafayette Street
New York, New York 10007
(212) 596 - 1800



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

-against-

PAUL LABRIOLA and THOMAS CONTINO,

Appellees.

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PETITION FOR RE-HEARING WITH SUGGESTION
FOR REHEARING EN BANC

PRELIMINARY STATEMENT

Defendants were charged in Indictment 75 CR 659(s) on March 29, 1976, which alleged the crimes of violation of 18 U.S.C. 495. On April 29, 1976 the defendants moved for dismissal of the indictment pursuant to the Interstate Agreement on Detainers Act, on the ground that the defendants had been returned from federal to state custody without having first been tried on the federal charges.

On May 12, 1976, it was agreed between the District Court, the Government and the defendants that the motions to dismiss would be held in abeyance until after the Court of Appeals had decided the case of United States v. Mauro, which had presented a similar issue. Pursuant to this agreement, the defendants agreed to waive their speedy trial rights.

After the Court of Appeals affirmed the dismissal of the indictments in Mauro, the District Court granted the

defendants' motions to dismiss, and this Court, on November 10, 1977 affirmed the dismissal in open court. A petition for re-hearing was denied, and the Government then petitioned the Supreme Court of the United States for a writ of certiorari based on the fact that a writ of certiorari had been granted in the Mauro case. The Supreme Court reversed the Mauro decision, and granted the petition for a writ of certiorari in this case, remanding the case to the Court of Appeals for re-consideration in light of the Mauro decision.

On July 24, 1978, without further argument or briefs, this Court reversed itself, and re-instated the indictment in this case, based on the Supreme Court's decision in Mauro.

REASONS FOR GRANTING THE PETITION FOR RE-HEARING

The issue presented by this appeal is not, and has never been, whether the decision of the Court of Appeals in United States v. Mauro, 544 F.2d 583 (2d Cir. 1976) was correct. Instead, the issue has been whether the Government, having agreed that the Court of Appeals decision in Mauro would be dispositive of this matter, can renege upon that agreement in view of the speedy trial waivers which were elicited from both defendants on the basis of that agreement,

After the Mauro decision was rendered by the Second Circuit, the Government attempted to avoid the consequences of its agreement by arguing that Mauro should not be applied retroactively to the facts of this matter. The District Court rejected this ploy, holding that

"It is apparent. . . that all parties understood that this court intended that the Court of Appeals ruling in Mauro would be dispositive of these motions. That intention was made abundantly clear"

Appendix "A" annexed hereto and made a part hereof.

The District Court further held that "The government stated that it had no objection to such a procedure, and it is now bound by that statement." Appendix "A".

On appeal, this Court affirmed, stating

"We agree--defendants in this case waived their speedy trial rights in order to allow the Court to obtain some guidance from the Court of Appeals in Mauro. The government is now contending, in essence, that the Court of Appeals ruling is irrelevant. Having acceded to the defendants' waivers, it should not be permitted to make such an argument, it seems to us."

Thus, the agreement is clear and indisputable. The defendants waived their speedy trial rights on the understanding that the Court of Appeals decision in Mauro would be dispositive of the issues presented herein.

This Court, by reinstating the indictment based upon the Supreme Court's decision in Mauro, has abrogated that agreement. It has held that the Court of Appeals ruling in Mauro is irrelevant, in spite of the fact that it previously held that, in view of the terms of agreement entered into between the parties, the Government could not so contend.

A re-hearing in this matter should be granted so that the Court might reconsider the real issue presented herein, which is whether the agreement between the parties that the Court of Appeals decision in the Mauro case would be dispositive of this matter, can be nullified by subsequent proceedings in Mauro and, if so, what is the effect of that nullification upon the defendants' speedy trial waivers.

En Banc consideration is suggested because of the importance of the underlying principles herein, which touch upon the scope, effect and validity of agreements between the prosecutor and defendants in criminal cases.

Respectfully Submitted

August 7, 1978

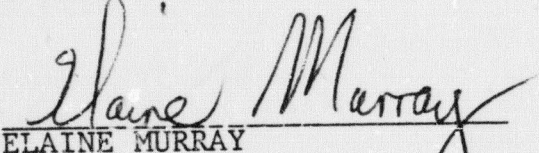
CAROL MELLOR
Attorney for Labriola
Office and P.O. Address
2 Lafayette Street
New York, New York 10007
(212) 596-1600

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

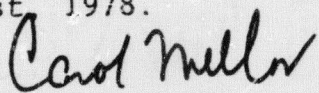
ELAINE MURRAY, being duly sworn, deposes and says:

That I am over the age of 18 years, am not a party to this action, and reside in New York, New York.

That on August 8, 1978 I served the within Petition for Re-hearing upon David Trager, United States Attorney, the attorney for the appellees in this action at 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


ELAINE MURRAY

Sworn to before me this
pm day of August, 1978.


CAROL MELLOR
Notary Public, State of New York
No. 24-4610725
Qualified in Kings County
Commission Expires March 30, 1979

APPENDIX D

United States District Court, Eastern District of
New York

(75-CR-659)

THE UNITED STATES

v.

PAUL LABRIOLA AND THOMAS CONTINO, DEFENDANTS.

COSTANTINO, D. J.

MEMORANDUM AND ORDER

[Filed in Clerk's Office, U.S. District Court E.D.
N.Y., June 28, 1977]

This is a motion by defendants Labriola and Contino to dismiss the indictment against them on the grounds that the government violated the Interstate Agreement on Detainers, 18 U.S.C. App. (Pub. L. 91-538, §§ 1-8, Dec. 9, 1970, 84 Stat. 1397-1403). There is no dispute that each defendant, while serving a state sentence, was brought into federal court by way of writ of habeas corpus ad prosequendum, then returned to state custody without being tried. The United States Court of Appeals for the Second Circuit, in *United States v. Mauro*, 544 F. 2d 588 (2d Cir. 1976) held that in such a situation, the federal indictment must be dismissed with prejudice.

The motions in this case were originally made in April and May, 1976. On May 12, 1976, the parties

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APPENDIX "A"

requested that this court reserve decision on the motions until such time as the Court of Appeals decided *Mauro*, which was then pending. That decision was handed down on October 26, 1976. The government filed a petition with the Court of Appeals for rehearing *en banc*, and again requested that this court reserve decision on the within motions until that petition had been acted upon. Rehearing was denied by the Court of Appeals on March 15, 1977.

The government concedes that both Labriola and Contino fall within the factual ambit of *Mauro*. Nonetheless, it argues that the indictment in this case should not be dismissed because *Mauro* should not be applied retroactively. This court need not decide the retroactivity question, since it finds that the government is equitably estopped from raising the issue in the context of the present case.

It is apparent from a reading of the transcript of the May 12, 1976 oral argument that all parties understood that this court intended that the Court of Appeals' ruling in *Mauro* would be dispositive of these motions. That intention was made abundantly clear when the court, in acceding to the parties' request to reserve decision until the Court of Appeals decided *Mauro*, stated that by doing so "I would know exactly whether or not you should continue or whether it [the indictment] should be dismissed." (Tr., May 12, 1976, p. 13). The government stated that it had no objection to such a procedure, and it is now bound by that statement. Cf. *United States v. Alessi*, 536 F. 2d 978, 981 (2d Cir. 1976), cert. denied, — U.S. —, 97 S.Ct. 384 (1976).

In addition, the defendants consented on May 12, 1976 to waive their speedy trial rights pending a decision by the Court of Appeals in *Mauro*. That waiver

was predicated upon the understanding that the decision in *Mauro* would control the determination of the within motions (see Tr., May 12, 1976, pp. 16-17). The court agrees with defendant Contino that to allow the government to make its retroactivity argument after the lengthy delay involved in this case, particularly where the delay was for the specific purpose of awaiting the Court of Appeals decision in *Mauro*, would be unconscionable and would cast grave doubt on the validity of the defendants' waiver of their rights under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (See Defendant Contino's Memorandum of Law, pp. 5-6).

In light of the foregoing discussion, and without deciding the broad question of whether *Mauro* is to be applied retroactively, the court finds that *Mauro* must control the disposition of these motions. Accordingly, the indictment against defendants Labriola and Contino must be, and is, dismissed. Defendant Labriola's bail is hereby exonerated. So ordered.

MARK A. COSTANTINO,
U.S.D.J.